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No. 89-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

—against—

GENERAL ELECTRIC COMPANY,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS' WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. Consent to the submission of a brief amicus curiae by the Joint

Industry Board of the Electrical Industry (JIB) having been granted by the Petitioners and refused by the Respondent the JIB hereby moves the Court for leave to file the amicus curiae brief submitted herewith.

2. The JIB is a jointly trusteed organization composed of an equal number of representatives from both management and labor in the electrical industry in New York City. The JIB's purpose is to promote harmony between employers and employees while continuing to improve the quality and safety of the electrical work performed in New York City.

3. The JIB is also the administrator of the numerous

multiemployer employee benefit plans that have been established pursuant to collective bargaining agreements between the New York Electrical Contractors, Inc., the Association of Electrical Contractors, Inc., and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.

4. The decision of the Court of Appeals for the Second Circuit, which held that §220 of the New York State Labor Law is preempted by ERISA has a severe detrimental effect to both the employers and the employees in the electrical industry in New York, as well as all employers and employees in the building trades industry.

5. This decision undermines the clearly stated purpose of §220 by expanding the preemption provisions of ERISA to an area of state law that ERISA was not intended to preempt.

6. The JIB believes that the decision of the Court of Appeals for the Second Circuit is incorrect and that such a ruling will have a detrimental effect not only on the electrical industry and the building trades, but also it will have a detrimental effect on the safety of the public at large.

7. By finding that the prevailing wage law of §220 of the New York State Labor Law is invalid, employers will be encouraged to hire less skilled and less

expensive labor which will lead to the reduction of safety on public work projects.

8. Although the Petition sets forth appropriate grounds for the issuance of the writ, it is our belief that the JIB's brief amicus curiae will serve to provide the Court with additional information in support of the issuance of the writ.

Dated: New York, New York
May 9, 1990

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QUESTIONS PRESENTED

Does ERISA preempt state prevailing wage laws such as New York's Labor Law §220, which requires that contractors employed on public work jobs either provide its employees with the prevailing fringe benefits or pay workers a cash amount equal to the cost of the benefits?

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The Joint Industry Board of the Electrical Industry (JIB) respectfully submits this amicus curiae brief in support of the petition for a Writ of Certiorari submitted by the Petitioners.

SUMMARY

In the exercise of their traditional police powers, states have set minimum labor standards for individuals employed on public works projects. When a state contracts for labor on public works projects, it performs a proprietary function. This Court has recognized that when a state acts in its proprietary capacity it has broad power to regulate. In the absence of compelling Congressional directive, this power should not be superseded.

The legislative history of ERISA indicates that Congress' primary motivation behind the Act was to prevent mismanagement of accumulated funds and to ensure that employees receive the benefits they are promised.

To meet these goals ERISA

establishes reporting and disclosure requirements and imposes a fiduciary standard of care upon the plan administrators.

Concerned that administration of employee benefit plans would be complicated by conflicting federal and state regulations, Congress enacted §514 of ERISA, 29 U.S.C. §144 to preempt any state laws that "relate to" employee benefit plans. Congress intended primarily to preempt state laws that seek to regulate employee benefit plans and thereby subject employee benefit plans to conflicting requirements. Where state law does not impose conflicting administrative duties, this Court has declined to preempt the state law. A more broad application of §514 is inconsistent with Congressional intent.

New York's prevailing wage and supplement statute affects ERISA plans in too tenuous or remote a manner to warrant preemption.

REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED

A. The United States Court of Appeals for the Second Circuit Incorrectly Invalidated New York State's Prevailing Wage Law Contrary to Prior Holdings Of The State's Court Of Last Resort

The New York State Court of Appeals previously passed upon the purpose of §220 of the New York State Labor Law and found it to be a proper state action. In Action Elec. Contr. Co. v. Goldin, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984) the Court found that the purpose of the statute is not to require contributions to a benefit plan but

rather to equalize the cost of labor. The Court reviewed §220 of the New York State Labor Law and upheld it so as to allow employers to pay in cash, to the employees, the equivalent of the cost of providing the prevailing supplemental benefits. Therefore, the New York Court of Appeals has interpreted its own state's prevailing wage law as not regulating or interfering with employee benefit plans governed by ERISA.

To the contrary the United States Court of Appeals for the Second Circuit was held in this case that §220 of New York State's Labor Law is preempted by ERISA because it relates to an employee benefit plan which is covered by ERISA.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW CONCERNING ERISA PREEMPTION WHICH THIS COURT SHOULD RESOLVE

The extent to which ERISA preempts state laws which deal with a state's ability to regulate public work jobs is an issue which must be resolved by the United States Supreme Court.

A. THE NEW YORK PREVAILING WAGE AND SUPPLEMENT STATUTE IS WITHIN THE STATE'S TRADITIONAL POLICE POWER AND SHOULD NOT BE PREEMPTED UNLESS CLEARLY INTENDED BY CONGRESS.

States have traditionally, in the exercise of their police powers, regulated minimum labor standards for construction contractors on state projects.[1] A state acts in its proprietary capacity when it contracts for labor on public works projects. White v. Mass. Council of Constr.

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[1] Pettis Moving Co.,Inc., v. Roberts, 784 F.2d 439 (2nd Cir 1986) State law requiring pension pay for hours worked over 40 held to be exercise of traditional state police power.

Employers., 460 U.S. 204 (1983). When a state acts in its proprietary capacity, this Court has recognized that the state has broad authority to set minimum labor standards for those working on the public project. Id. See also Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976), Atkins v. Kansas, 191 U.S. 207 (1903).

Due regard for the presuppositions of federalism requires that the police powers of the state not be superseded by federal act unless that was the clear manifest intent of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1974). Where the regulated conduct involves local interests traditionally left to state regulation, and the activity regulated is merely a peripheral concern of a federal act, the

Courts should not infer that Congress has deprived the states of the power to act. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-244 (1959).

B. THE NEW YORK PREVAILING WAGE AND SUPPLEMENT STATUTE DOES NOT SUBJECT EMPLOYERS TO CONFLICTING REQUIREMENTS AND WAS NOT INTENDED TO BE PREEMPTED BY ERISA.

In any preemption analysis, "the purpose of Congress is the ultimate touchstone." Metropolitan Life Ins. Co., v. Massachusetts, 471 U.S. 724, 747 (1985). The legislative history indicates that Congress' primary concern in enacting ERISA was to control two major abuses, "mismanagement of funds accumulated to finance ... [employee] benefits, and failure to pay employees the benefits promised" from those

accumulated funds.[2] Through federal act, Congress intended to ensure that if an employee was promised pension benefits upon retirement, and that employee fulfilled the conditions precedent to vesting of the promised benefit, the employee would actually receive those benefits. Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980).

To ensure that employee expectations are not defeated, ERISA establishes reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administration, and establishes schedules for vesting and accrual of

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[2]California Hosp. Assn. v. Henning., 770 F.2d 856, 859 (9th Cir. 1985), cert. denied 477 U.S. 904 (1986); also see 120 Cong. Rec. 4279-80 (1974) (statement of Rep. Bradenas).

pension benefits. Massachusetts v. Morash., ___U.S.___, 109 S.Ct. 1668, 1671-72 (1989).

Concerned that employers would be subject to a variety of conflicting federal and state regulation, Congress enacted §514, 29 U.S.C. §1144.[3] Senator Willis, floor manager of the bill that was to become ERISA and Chairman of the Committee on Labor and Public Welfare stated that except in limited circumstances, ERISA would "preempt the field for federal regulations thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29, 942 (1974).

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[3]Section 514(a) of ERISA preempts "any and all state laws insofar as they may now or hereinafter relate to any employee benefit plan" covered by ERISA.

While the intent to preempt certain areas of state law is clear, the ultimate scope of that preemption is not.[4] Traditionally the role of the Courts is to accommodate rigid statutory language to a myriad of varying factual situations.

Where state law has created the prospect that an employer's administrative scheme would be subject to conflicting requirements, this Court has not hesitated to enforce ERISA's preemption provision. For example, in Alessi v. Raybestos-Manhattan Inc., 451

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[4]Senator Jacob Javits, ranking minority member of the Committee on Labor and Public Welfare suggested that perhaps §514 was an over inclusive starting point for preemption analysis noting that "the desirability of further regulation-at either the State or Federal level-undoubtedly warrants further attention." 120 Cong. Rec. 29, 942 (1974).

U.S. 504 (1981) this Court struck down a New Jersey state statute prohibiting offsetting workers' compensation payments against pension benefits, a practice permitted under federal law. The effect of the statute was to force an employer either to structure its benefits payments in accordance with New Jersey law, or to adopt different payment schedules for in-state and out-of-state employees. The statute's only purpose was to set forth additional statutory requirements for pension plans, a purpose not permitted by Congress. Id at 524.

Where state law does not create the prospects that the employer's administrative scheme will be subject to conflicting regulations, this Court has declined to hold that the law is

preempted.

In Massachusetts v. Morash, __U.S.__, 109 S.Ct. 1668 (1989) this Court was called on to determine whether an employer's policy of paying discharged employees for unused vacation time out of the company's general assets constituted an "employee benefit plan" within the meaning of ERISA. The Court held that although §3 of ERISA defines an "employee welfare benefit plan" as "any plan maintained for the purpose of providing...vacation benefits," when viewed in light of the primary purpose of preventing mismanagement of funds and failure to pay promised benefits it cannot be understood to, or relate to, ordinary vacation benefits which are payable on a regular basis from the general assets of the employer. Id at

1673.

In upholding the Massachusetts law requiring such payments the Court stated that:

> Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside employee's control, they present none of the risks that ERISA intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed--a danger Congress chose not to regulate in ERISA. Id at 1673

In Fort Halifax Packing Co. Inc. v. Coyne, 482 U.S. 1 (1987), a Maine statute required employers to provide a lump sum severance payment to employees laid off in the event of a plant closing. Upholding the statute, the Court said:

> Congress intended preemption

> to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employers obligation. Id at 11.

The Maine statute did not give rise to these types of concerns. It neither established nor required an employer to maintain an employee benefit plan. No administration was necessary for the employer to meet its obligations.

The New York State prevailing wage law requires that laborers, workers and mechanics on public works projects be paid not less than the rate of wages and wage supplements which prevail for workers in the same trade in the

locality of the project.[5] The employer (contractor) meets its statutory obligation when it pays in cash, totally or partially, the cost of prevailing supplemental benefits. Action Elec. Contr. Co., v. Goldin, 64 N.Y. 2d 213, 222, 485 N.Y.S. 2d 241, 245, 474 N.E. 2d 601, 605 (1984). The statute does not require the creation of a fund from which prevailing supplemental benefits will be paid, nor does the statute require that the employer contribute to a benefit plan. As the New York State Court of Appeals has concluded, "this provision should not be interpreted to

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[5]Wage supplements are defined as "all remuneration for employment paid in any median other than cash, or reimbursement for expenses, or any payments which are not 'wages,' including benefits such as health insurance, vacation and holiday pay." N.Y. Labor Law §220(5) (McKinney's 1986)(40a).

require that the employer maintain or contribute directly to a benefit plan equivalent in kind to the prevailing one in order to comply with the statute." Thus the fund management and administration concerns of ERISA are not implicated.

The prevailing wage and wage supplement rates are determined annually by the fiscal officer.[6] The employer is not required to adjust its benefit plan contributions or to make additional calculations to achieve compliance with the law. The payments remain fixed amounts payable directly to the employees with their regular

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[6]The fiscal officer for all public works contracts, other than those on behalf of New York City, is the State Commissioner of Labor. For contracts on behalf of New York City, the City Comptroller acts as the fiscal officer. N.Y. Labor Law §220(5)(6).

compensation from the contractor's general assets. "To do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax Packing Co., 482 U.S. 1, 12 (1987).

C. THE PREVAILING WAGE AND SUPPLEMENT LAW AFFECTS EMPLOYEE BENEFIT PLANS IN TOO TENUOUS AND REMOTE A MANNER TO WARRANT PREEMPTION.

Generally, the laws which this Court has ruled preempted, are those that provide an alternative cause of action to employees to collect benefits protected by ERISA or laws that apply specifically to ERISA plans.[7]

[7]State laws or actions that have been preempted include: Common law tort and contract actions asserting improper processing of benefit clause, Pilot Life Ins., Co. v. Dedeaux, 481 U.S. 41 (1987); state law specifically exempting ERISA covered benefits from a generally applicable garnishment law, Mackey v.

Laws that have not been preempted are laws of general application--often traditional exercises of state police power or regulatory authority--whose effect on ERISA plans are incidental to the law's primary objectives. Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2nd Cir. 1989). Some state laws may "affect employee benefit plans in too tenuous, remote or peripheral a manner" to warrant preemption. Shaw v. Delta Air Lines Inc., 463 U.S. 85, (1982).

Based upon these cases, it appears

Lanier Collection Agency Service Inc., 486 U.S. 825 (1988); state law prohibiting discrimination in benefit progress on the basis of pregnancy, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); and state law prohibiting method of benefit calculation permitted by ERISA, Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). See generally Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2nd Cir. 1989). cert denied 110 S.Ct. 57 (1989).

that what "triggers preemption is not just any indirect effect or administrative procedures, but rather an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." 869 F.2d 142 at 146-47.

New York's prevailing wage law does not effect a benefit plan's administrative procedures, does not effect benefit eligibility and does not regulate the amount of a benefit paid by a plan. It merely seeks to equalize labor costs for employers bidding on public works contracts. Any administrative constraints that this law places on plan administrators is merely incidental.

New York's prevailing wage law may

make an employer's benefit plan more expensive to operate, but the mere fact that the statute has some economic impact on a plan does not require that the statute be invalidated. In Rebaldo v. Cuomo, 749 F.2d 133 (2nd Cir. 1984) the Court held:

> If ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where, as here, a State statue of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated. Id at 138-139.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
May 9, 1990

Respectfully submitted,

Yours, etc.
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